

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Compatibility Between Cable
Systems And Consumer
Electronics Equipment

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PP Docket No. 00-67

**Comments of the
Home Recording Rights Coalition**

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Summary

The Commission faces pivotal and fundamental decisions as to consumer viewing and home recording rights, comparable to those raised by litigation in the analog era. The target of the "Betamax" case was distribution of devices with video recording capability. Today, the target is the *distribution of video signals among consumer home devices*. Program distribution interests seek the power to cut signals off before they even reach display or recording devices, if there is any chance that the signal might be recorded by a consumer. The FCC has jurisdiction over the specifications and licenses that would be used as a means to such an end, and through its continuing oversight needs to decide what constraints can lawfully be imposed on consumers through such licenses.

With respect to home recording in the digital era, HRRC offers Core Principals for reference in such a determination:

- Fair Use remains vital to consumer welfare in the digital age. Consumers should continue to be able to engage in time-shifting, place-shifting, and other private, noncommercial rendering of lawfully obtained music and video content.
- Products and services with substantial non-infringing uses, including those that enable fair use activities by consumers, should continue to be legal.
- Home recording practices have nothing to do with commercial retransmission of signals, unauthorized commercial reproduction of content, or other acts of "piracy." Home recording and piracy should not be confused.
- Any technical constraints imposed on products or consumers by law, license or regulation should be narrowly tailored and construed, should not hinder technological innovation, and may be justified only to the extent that they foster the availability of content to consumers.

In attempting to influence the licenses and specifications over which the FCC has jurisdiction, motion picture companies seek the power to cut off or degrade signals flowing to interfaces that are already relied upon by DTV consumers. Such a one-sided outcome would be fundamentally unfair to

consumers who have paid for every element of the program delivery chain – the DTV-ready receiver, the cable service, and the set-top box. The licenses in question would also grant complete authority to program distributors over what consumers can or cannot record. Yet even the motion picture industry has acknowledged that present consumer practices are reasonable, and ought to be preserved in the digital world. The Commission should not approve any license that implements the unprecedented copy control power that comes with digital encryption without also approving balanced “recording rules” that protect consumers’ reasonable and customary practices.

FCC jurisdiction over these matters is plain. Any license imposing copy control constraints on devices designed to operate with OpenCable PODs would be in violation of FCC regulations, which clearly limit intellectual property or license impositions on OpenCable host devices to implementations of conditional access or theft of service technologies. Such conditional access or theft of service technologies are explicitly banned from inclusion in OpenCable host devices. For a license embracing downstream interface and copy control functionality to be legal, the FCC would have to revise its regulations. The FCC also has jurisdiction over these licenses and specifications through its reserved oversight authority, in having entrusted implementation of Congress’s mandate to a private sector standards body.

The FCC should approve only a DFAST license that promotes consumer choice of products and configurations, as envisaged by Congress and implemented by the Commission. Time for a lawful solution has, in fact, run out. To enable any compliance whatsoever with the July 1, 2000 deadline for support, on Cable systems, of competitively manufactured and distributed devices, a non-restrictive interim license must be offered immediately. Once the Commission has made a determination in the present proceeding, it should then provide guidelines for negotiation of a lawful, permanent license for production and distribution.

To the extent the Commission cannot fully address all elements of a balanced resolution of issues, HRRC would be willing to cooperate in a Commission airing of long-term concerns potentially to be addressed by the Congress.

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The Home Recording Rights Coalition was formed in October, 1981, after the U.S. Court of Appeals for the Ninth Circuit held that the marketing of video recording products to consumers was a violation of U.S. copyright law.¹ Although this decision, in the "Betamax" case, was reversed by the Supreme Court in 1984,² the assault on consumers, and on the responsible exercise of consumer choice and discretion, has continued to this day.

This proceeding³ may mark a pivotal point in the treatment of consumers at the hands of industry, law, and regulation, of a consequence not approached since the basic issue of home recording was being argued in the United States Supreme Court. In the “Betamax” case, there was no challenge to the rights of consumers to view programs that they were lawfully entitled to receive. Here, not only are critical home recording rights again in jeopardy, but some consumers also face losing the ability to view programming for which they have fully paid.

³ *In the Matter of Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67, Notice of Proposed Rulemaking (Rel. Apr. 14, 2000)(the "Compatibility NPRM").

The target of the "Betamax" case was distribution of devices with video recording capability. Today, the target is the *distribution of video signals among consumer home devices*. Some copyright proprietors aim to cut signals off before they even reach recording devices, if there is any chance – however remote – that the signal might be recorded by a consumer. Hollywood's copyright journey up the distribution channel has moved the "copy protection" issue squarely into areas in which the Congress has repeatedly given the FCC jurisdiction, and has instructed the Commission to empower, rather than defeat, consumer choice.

Whenever consumers have seemed in danger of being denied their rights pertaining to use of their own devices for private noncommercial purposes, the HRRC has filed comments in relevant FCC proceedings.⁴ HRRC welcomes the Commission's recognition, in this proceeding, of the potential seriousness of the threat to consumers, and of the responsibilities that Congress has directed the Commission to assume.⁵

I. Consumers Who Adopt Digital Technologies Should Receive The Benefit Of Their Bargain.

HRRC has said repeatedly and consistently in Congressional hearings⁶ and before the Commission⁷ that outcomes in controversies related to consumer home

⁴ See, e.g., HRRC Comments *In the Matter of Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992; Compatibility Between Cable Systems and Consumer Electronics Equipment*; ET Docket No. 93-7 and *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Buy-Through Prohibition*, MM Docket No. 92-266.

⁵ See Appendix A for a statement of HRRC mission and membership.

⁶ See, e.g., *WIPO Copyright Treaties Implementation Act: Hearing Before the Subcomm. On Courts and Intellectual Property of the House Committee On the Judiciary*, 105th Cong. (Sept. 17, 1997)(statement of Gary J. Shapiro, Chairman, Home Recording Rights Coalition); *WIPO One Year Later: Assessing Consumer Access to Digital Entertainment on the Internet and Other Media: Hearing Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce*, 106th Cong. 33-40 (Oct. 28, 1999)(the "WIPO Hearing")(statement of Gary Klein, Vice Chairman, Home Recording Rights Coalition).

recording should reflect a reasonable balance between consumer rights and expectations, and copyright owner concerns. Some issues in this proceeding arise because home interface technologies – despite their sophistication – are not sufficiently flexible to afford a fine balance of rights. The question for the Commission is, who should bear the burden of imprecise tools – Hollywood or consumers?

HRRC believes that the transition to digital television ultimately will be paid for by consumers, and will succeed only if consumers receive some equity in the transaction. If digital sophistication is to be used *only* to granulate products and restrict consumers' freedom of action, the price will be steep. The Commission must beware of such outcomes.

A. Consumer Displays Should Not Be Disabled to Serve a Copy Protection Agenda.

The concurrent use of digital and analog technologies in distributing DTV signals to consumers poses "compatibility" issues. While the means of compression, transmission, and demodulation of "digital video" programs are digital, most DTV displays – whether sold as consumer electronics DTV receivers or computer monitors – are analog. Indeed, over 90% of the DTV television displays sold thus far to consumers are sold as "DTV ready." Like most computer monitors, they are essentially analog picture tubes with sophisticated scanning, bandwidth and resolution capabilities that enable them to display HDTV or DTV programs transmitted according to ATSC standards.⁸

The only way to provide a signal of sufficient bandwidth to take advantage of these devices' enhanced display properties is to employ either the "RGB" interface,

⁷ Statement of Ruth Rodgers, Executive Director, Home Recording Rights Coalition at the FCC Office of Engineering and Technology Roundtable on DTV Receiver Compatibility With Cable Television Service (May 20 1999) (the "FCC DTV Roundtable").

⁸ In others, receiving circuitry is integrated into the same box as the display. Even where the customer – as only about 10% presently do – buys the display and the "set-top box" as a pair, an analog interface is necessary to carry the signal from one to the other.

commonly used to connect computer monitors to CPUs, or a consumer electronics variant (usually called "Y,Pb,Pr"). In such case the signal is decompressed at the output of a companion "receiver" device (whether a broadcast, cable or satellite "set-top box"), descrambled (if it has been scrambled), and converted to the analog interface format for transmission to the display. The use of an analog link from set-top to display does not degrade the picture compared to a "digital" link – in either case, so long as an analog picture tube is used, this conversion must occur at some point.⁹

In deciding whether or not to support licensed copy protection technologies, some motion picture companies have established the business objective of being empowered to cut off, or at least downgrade the resolution of, any previously scrambled signals that are provided to any such "component analog" interface, because they cannot be assured of controlling all copying of signals sent to the analog interface. In the example given above of the studios exercising such power, the signal would simply not be provided to the interface, or would be provided only in degraded resolution. Their rationale is that, thus far, there is no certain way to exert and enforce copy protection over programs running over these interfaces. So, even though, at present, there are no consumer recorders or computers designed to record signals received over such high definition analog interfaces, the movie studios threaten to chop off the hand, to be sure that the fingers will never move.¹⁰

⁹ Hence, the home recording issues raised with respect to such interfaces do not pertain only to "legacy" products. Manufacturers, mindful of "Moore's Law" as to obsolescence of digital circuitry, may find such designs most efficient even after digital home networks are in common use. See Section III.C below.

¹⁰ See, e.g., *FCC DTV Roundtable* (statement of Chris Cookson, Executive Vice President Technical Operations, Warner Bros.); *Broadcasters Seek FCC Deadline for DTV-Cable Compatibility*, Warren's Cable Regulation Monitor, May 24, 1999 (noting Chris Cookson concerns over digital copy protection, saying "content suppliers simply won't make programs available to DTV if piracy is too easy."); David Hatch, *TV Makers Angered by MPAA's Stance*, Electronic Media, Nov. 2, 1998, at 6; Christopher Stern, *MPAA Getting High-Def Pix Headache*, Daily Variety, Oct. 28, 1998, at 1 (discussing Aug. 12, 1998 letter from Jack Valenti, MPAA CEO, to Gary Shapiro, CEMA, re: threat to withhold digital programming from distribution channels based on copy protection concerns); *Ex Parte* Letter from Jack Valenti to Chairman William E. Kennard (filed June 9, 1999).

HRRC believes that such an outcome would be fundamentally unfair to consumers. Consumers who have purchased DTV and DTV-ready receivers are the pioneers of the transition to digital broadcasting. Cutting off interfaces, out of concern that some signals might be recorded in the home, would mean that even though these consumers have paid thousands of dollars for a revolutionary display, have paid for the cable service, and have paid for the set-top box, their ability to partake of the display's value would be cut off, either flatly by license specifications, or at the whim and control of motion picture studios. This is not the smooth transition to DTV with which Congress has entrusted the Commission.

B. Reasonable and Customary Consumer Video Home Recording Practices Should Be Preserved.

The threat to ordinary consumer viewing, by cutting off interfaces to DTV-ready sets, should not distract the Commission from a similar threat to customary private, noncommercial home recording by consumers. This threat is also encountered within the jurisdiction of the licenses the FCC oversees.

Since 1993, the HRRC has been working to negotiate reasonable "recording rules" – agreed limitations on the circumstances in which bilateral technologies could be used to defeat consumer home recording abilities.¹¹ After attempts to work out such outcomes in a legislative context were suspended,¹² similar discussions ensued in the arena of private sector licensing. In testimony before Congress, the Motion Picture Association of America (MPAA) has reassured the Telecommunications, Trade and Consumer Protection Subcommittee that

¹¹ A "bilateral" technology is one that depends on specific cooperation of a device or software manufacturer in enabling viewing or making the constraint on copying effective. A "unilateral" constraint is one imposed without consultation with the device manufacturer, relying on device design characteristics that, the designer of the constraint hopes, will not be changed. Concern over possible attempts by the content owner or technology provider to pre-empt changes in device design by challenging them as "circumvention" under 17 U.S.C. Section 1201 led to the Congress inserting Section 1201(c)(3), which stipulates that this "circumvention" provision cannot operate as a product design mandate.

¹² See *WIPO Hearing* at 37 (statement of Gary Klein), Statement of Ruth Rodgers at 3-4, *FCC DTV Roundtable*.

consumers will be able to engage in the sort of “time shifting” recording in the digital world to which they reasonably have become accustomed in the analog world.¹³

But serious controversies persist, and the field for application of these licenses has now moved squarely into the Commission’s jurisdiction in this and other proceedings.¹⁴ Hence, the need for “recording rules,” and their potential scope and enforcement, have become issues for the Commission.

C. *Industry Standards Practices Should Reward Design Efficiency and Consumer Choice.*

Traditionally, technical standards set in the private sector are voluntary, so as not to constrain commercial competition and consumer sovereignty. Where industry-wide standards become necessary to enable competition, however, there is a danger that constraints built into such standards may become barriers to efficiency, and also defeat consumer choice. Hence, whenever it has recognized the need for, and required adherence to, such standards, the Commission has exercised its jurisdiction to assure that they enable rather than defeat consumer sovereignty.¹⁵

In this proceeding, there is a particular danger that the same standards and specifications that have been required by the FCC as a means to enable competition will instead become cats-paws for retrieving copy protection objectives, by being bent to a one-side industry agenda. In addition to thwarting consumer expectations, such a development would impose priorities other than design

¹³ *WIPO Hearing* at 53-54, 58 (testimony of Jack Valenti, President, MPAA). See Section III.C. below.

¹⁴ See discussion at Section II below.

¹⁵ See, e.g., *In the Matter of Revision of Part 68 of the Commission’s Rules to Specify Standard Plugs and Jacks for the Connection of Telephone Equipment to the Nationwide Telephone Network*, Docket No. 20774, *Report & Order*, 62 FCC.2d 735 (1976); *In the Matter of Telephone Number Portability*, CC Docket No. 95-116, *Second Report & Order*, 12 FCC Rcd 12281 (Rel. Aug. 18, 1997); *In the Matter of Numbering Resource Optimization*, CC Docket No. 99-200, *Report & Order and Further Notice of Proposed Rulemaking*, 2000 FCC LEXIS 1691 (Rel. Mar. 31, 2000).

efficiency and consumer choice. We will discuss this threat, and the oversight necessary by the Commission, in detail.

II. The FCC Has Jurisdiction To Address The Main Issues Endangering Consumers Who Adopt Digital Video Technologies.

The issues before the Commission in this proceeding are of major consequence to most consumers. About two-thirds of all consumers receive *all* of their television channels over cable; more than three-fourths receive all television programming from some Multichannel Video Program Distributor (MVPD).¹⁶ The public (indeed, Commission) reaction to pending "retransmission consent" disputes, in which a single broadcast channel has been removed from cable delivery for brief periods of time, demonstrates the primacy of the cable delivery path.¹⁷

In the Telecommunications Act of 1996, Congress instructed the Commission to ensure, in its regulations, the competitive commercial availability of all "Navigation Devices," necessary to deliver *any* service of an MVPD, from manufacturers and vendors not affiliated with the MVPD.¹⁸ In CS Docket 97-80, the Commission took on this responsibility, and thus far has issued regulations imposing responsibilities on Cable Multi-System Operators (MSOs) to support such competitive availability fully by July 1, 2000.¹⁹

¹⁶ See, e.g., *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 99-230, *Sixth Annual Report*, 15 FCC Rcd 978 (Rel. Jan. 14, 2000).

¹⁷ See, e.g., *In the Matter of Time Warner Cable; Emergency Petition of ABC Inc. for Declaratory Ruling And Enforcement Order for Violation of Section 76.58 of the Commission's Rules, or in the Alternative For Immediate Injunctive Relief*, CSR 5543-C, *Memorandum Opinion & Order* (Rel. May 3, 2000).

¹⁸ 47 U.S.C. § 549.

¹⁹ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80, *Report & Order*, 13 FCC Rcd 14775, ¶ 76 (Rel. June 24, 1998) (*Navigation Device R&O*); *Order on Reconsideration*, 14 FCC Rcd 7596 (Rel. May 14, 1999) (*Navigation Device Reconsideration Order*); 47 C.F.R. § 76.1204.

During the course of the Commission's consideration of regulations in CS Docket 97-80, the Cable industry came forward to propose that the Commission rely on the "OpenCable" project of its industry consortium, CableLabs.²⁰ The Commission received, and ultimately relied upon, assurances that the CableLabs project would include specifications for a *common security interface*, whereby MSO-specific security circuitry, necessary to implement conditional access and protect against theft of service, would be isolated on a "Point of Deployment" ("POD") module provided by the MSO.²¹ This would enable all other circuitry to be offered competitively in consumer electronics and computer "host devices."

The proposal for a POD security interface addressed the concerns of many who wanted to offer competitive products providing Cable "navigation" services, but had been frustrated by legitimate concerns of MSOs that such devices, if not obtained and physically controlled by the MSO, could be connected without authorization, so that their use would constitute theft of service.²² These cable providers wanted to be able to configure or change security on a system-specific basis, which would be impossible if the entire Navigation Device were to be merchandised nationally. The implementation of a common, national security interface would allow each local cable system to provide its own "POD" module, without restricting the marketing or configuration of competitive Navigation Devices.

The implementation of the POD security interface should allow competitive "host" devices to be sold nationally as stand-alone set-top boxes. Navigation circuitry can also be built into televisions, computers, DVD players, video recorders, and yet unimagined "convergence" products that can be POD-enabled. In the

²⁰ See *Navigation Device R&O* ¶ 70-81.

²¹ *Id.*

²² See, e.g., Circuit City Navigation Device Comments at 31; Consumer Electronics Manufacturers Association Navigation Device Comments at 16-18; Consumer Electronics Retailers Coalition Navigation Device Comments at 15-23; GTE Navigation Device Comments at 7; ITI/CompTIA Navigation Device Comments at 24-25; Tandy Navigation Device Comments at 12-13; Viacom Navigation Device Comments at 6-9.

absence of such an interface, providing for local provision of security circuitry, *any* device able to tune a digital cable system would have to be provided *only* by the local cable operator. It was to avoid such an anticompetitive result in the digital age, and facilitate consumer choice, that Congress instructed the Commission to ensure that its regulations provide for competition and consumer choice.

A. The Majority of DTV Consumer Electronics and Information Technology Receivers and Recorders Will Require an "OpenCable" License.

Unless there is some radical change in market share, the majority of DTV viewers, like the majority of present television viewers, will receive *all* of their television transmissions by means of cable. It also seems likely that, in the digital realm, most, or even all, digital cable transmissions will be encrypted between the cable "head end" and the home. Thus a "POD" (or equivalent circuitry in Navigation Devices distributed by cable MSOs²³) will be necessary for DTV devices to function with digital cable systems.²⁴

Digital technology allows several features and functions to run off the same "core" of computational and memory circuitry. Hence, predictions that Navigation Device circuitry would be "built in" to a wide range of devices have started to come true. In the DBS environment, in which Navigation Devices are already sold in a competitive market, navigation functions have been integrated into DTV receivers, and recording functions have been integrated into receiver "set-top boxes."

²³ Commission regulations give MSOs until January 1, 2005 to implement, in devices they provide directly to consumers, the POD interface on which competitive Navigation Devices must rely. 47 C.F.R. § 76.1204. However, as it is necessary for these devices to work on the same system, presumably these "MSO boxes" must deal with the same encryption technology.

²⁴ One of the Commission's questions in this NPRM is whether, as is the general rule as to analog cable services, cable operators should be prohibited from scrambling or otherwise encrypting "basic cable" services for transmission to the home. *Compatibility NPRM* ¶ 16. While HRRRC supported (indeed, proposed) the existing analog rule, such an outcome does not seem necessary in the digital environment, where sets or set-top boxes can be POD-equipped, *provided* that such scrambling is not used to *deny viewing* to consumers as a clumsy form of copy protection.

Indeed, even MSO-provided "set-top boxes" have appeared sporting video recording functionality.²⁵

It seems evident, then, that the ultimate OpenCable specifications, and any license or technical burden attached to them, will be of primary importance to most consumers. At least after 2005, when *all* new Navigation Devices must rely on PODs, most digital cable customers will need a POD to enable the operation of some device in their home. Many or most DTV receivers will be POD-equipped, as will video recorders, DVD players, and a range of information technology products. Through Congress' mandate in Section 304 of the Telecommunications Act, and its Navigation Device docket, the Commission stands astride this revolution. It has a responsibility not to allow it to be turned against consumers, cutting off rather than enhancing the capabilities of the products available to them.

B. FCC Regulations Prohibit Incorporation of System Security Technology in OpenCable Host Devices, and Prohibit Imposition of License Conditions On Host Devices for Purposes Other than System Security.

In its Navigation Device regulations, the Commission set out a necessary and logical set of definitions and rules:

- All functions implementing security and conditional access are to reside in the POD.²⁶
- All Navigation functions except for security and conditional access are to reside in the host device.²⁷
- In licensing host devices, MSOs may not impose conditions other than those necessary to prevent attacks on security or conditional access.²⁸

²⁵ See, e.g., Bill Menezes, *Big MSO Orders Highlight Set-Top Progress at Show*, Multichannel News, Dec. 20, 1999, at 61 (discussing GI-TiVo product development projects). This seems to validate the concerns that, if the Commission's regulations in CS Docket 97-80 do not succeed, integrated cable DTV products will be able to be offered *only* by MSOs.

²⁶ 47 C.F.R. §§ 1200, 1204.

²⁷ *Id.*

The rule against imposing conditions on licensees grew out of the Commission's extensive experience with the deregulation of the market for telephone Customer Premises Equipment.²⁹ If entrenched telephone service providers had been able to impose conditions – other than those preventing “harm to the network” – on the designs, uses, storage or interface capacities of devices designed to use the RJ11 interface, the competitive history leading up to the Internet age would have been different, or may not have developed at all.

Clearly, concerns over copy protection are conceptually and legally different from defending security and conditional access, hence the following are in the realm of the prohibited constraints:

- Whereas there is never any consumer justification for unauthorized receipt of cable service, consumers regularly engage in unauthorized copying that has been recognized by the Supreme Court as a fair use.
- “Conditional access” applies to providing a signal on the condition that a customer pays for it. Copy protection impositions would apply to signals that a customer *already* has paid for.
- If copy protection circuitry, in the host device, were classified as “conditional access” or “security,” its inclusion in the host would be *illegal* under the Navigation Device regulations, which require all conditional access and security circuitry to be isolated on the POD. Hence *the OpenCable specifications themselves would be illegal*, and MSOs would be subject to severe sanction on July 1.³⁰

²⁸ Section 76.1204(c) provides: “No multichannel video programming distributor shall by contract, agreement, patent, intellectual property right or otherwise preclude the addition of features or functions to the equipment made available pursuant to this section that are not designed, intended or function to defeat the conditional access controls of such devices or to provide unauthorized access to service.” 47 C.F.R. § 76.1204(c).

²⁹ Indeed, the CPE deregulation process was a template for the congressional drafters of Section 304. See, e.g., *Hearing on Telecommunications Reform Legislation Before the Senate Committee on Commerce*, 104th Cong., 1st Sess. (Jan. 9, 1995) (statement of Hon. Thomas J. Bliley, Chairman of House Committee on Commerce) (“We have seen what has happened in the telephone market – we should insist on the same type of dynamics for . . . set-top boxes and other devices.”).

³⁰ Section 76.1204 requires that all security and conditional access circuitry be isolated in the POD. If copy protection circuitry, required by license in the host device, were considered to be addressed to conditional access or security, the OpenCable specification would not be in compliance with the regulations. The regulations provide for severe

In any event, in entrusting to a single private sector body the development of standards to implement Congress's mandate, the FCC reserved clear and aggressive oversight jurisdiction over all matters pertaining to implementation of the OpenCable standards, including issues as to technology, licensing, and support of competitive devices on systems.³¹ Even in the absence of its explicit regulations, the Commission would have authority to prevent one-sided and anti-competitive impositions on consumers.

C. *FCC Approval is Necessary for Imposition of Copy Control Conditions On Host Devices.*

Since any license that imposes copy control constraints on devices designed to operate with OpenCable PODs would be in violation of FCC regulations, the FCC would have to change these regulations in order for any such license conditions lawfully to take effect. This is a significant responsibility. The Commission should approve any such change to its regulations only if it is satisfied that consumers of present and future DTV products would be treated equitably.

D. *Approval of Anti-Consumer Provisions Would Impose De Facto Copy Control Limitations On Video Services Other than Cable.*

As we note at the outset, this is a pivotal time. The questions of support for interfaces that service the DTV products that consumers are buying today, of equitable consumer home recording, and of design efficiency will be raised with respect to other MVPD systems as well. If the Commission were to change its regulations, so as to approve license outcomes that are oppressive to consumers, it would become impossible for non-cable MVPDs to resist pressure to accept such anti-consumer provisions. According to published reports, program providers already have threatened, singly and *en masse*, to withhold content from distributors who do not bend to their wishes.

sanction in such case, including enjoining the distribution of MSO boxes. *Navigation Device R&O* ¶ 62.

³¹ *Navigation Device R&O* ¶¶ 69, 125; *Navigation Device Reconsideration Order* ¶¶ 33, 41.

E. No Single Private Sector Negotiation Can Resolve the Pending Issues that Imperil and Inconvenience Consumers.

While it may be possible to agree in theory on "recording rules" that are fair to consumers, and on copy protection technologies that, if universally applied, would bolster copyright owner interests, there seems, at present, no single forum available to articulate and enforce these rights and remedies:

- The "5C" companies and content providers might agree on license terms that include technology and recording rules, but their application beyond the "DTCP" signal path cannot be assured.
- The OpenCable "DFAST" license for POD-enabled products would not apply to new MSO-provided products until 2005.
- Products "upstream" of "5C" inputs can provide signals that may already have been recorded, raising issues of applying recording rules designed for a specific technical framework.
- Products "downstream" of the non-5C outputs of a "5C" or "POD" licensed device (e.g., a display or a recorder) may require particular interfaces, or not be under any license obligation to perform "recording rule" obligations.

The Commission, therefore, cannot successfully perform its obligations piecemeal. To exercise its oversight jurisdiction as to any piece of the puzzle, it must acknowledge and address the serious public policy issues that are presented. Below, HRRC offers its views as to the issues of consumer interest that will be encountered.

III. The Commission Should Address Copy Protection Issues So As To Preserve Consumer Ability To View And Record Programming In Reasonable And Customary Fashion.

As we discuss above, the Commission regulations would have to be changed in order for the DFAST license to address policy issues, such as fair use status of unauthorized consumer home recording, where consumer conduct does not imperil system security or constitute theft of service. HRRC has addressed these issues in the Congress since 1981, and, with respect to Commission proceedings, since 1991.

This year, HRRC has adopted a set of Core Principles for recommended application in the age of digital convergence, and has focused on the Commission's pivotal role, due to its oversight responsibilities.

A. *Pro-Consumer Core Principles Should Be Applied to Issues In Controversy.*

In March of 2000 HRRC adopted an updated set of core principles for internal guidance and external reference in the era of digital convergence. These reflect HRRC's two decades of experience, having met with consumers, retailers and opinion leaders in all 50 states, as to policy issues that pertain to home recording. The main points are set forth below:³²

HRRC CORE PRINCIPLES

1. *Fair Use remains vital to consumer welfare in the digital age. Consumers should continue to be able to engage in time-shifting, place-shifting, and other private, noncommercial rendering of lawfully obtained music and video content.*
2. *Products and services with substantial non-infringing uses, including those that enable fair use activities by consumers, should continue to be legal.*
3. *Home recording practices have nothing to do with commercial retransmission of signals, unauthorized commercial reproduction of content, or other acts of "piracy." Home recording and piracy should not be confused.*
4. *Any technical constraints imposed on products or consumers by law, license or regulation should be narrowly tailored and construed, should not hinder technological innovation, and may be justified only to the extent that they foster the availability of content to consumers.*

B. *HRRC has Identified Key Issues in Consumer Petitions to the FCC.*

Based on the considerations later formulated in the "Core Principles," and on an expectation that the Commission would need to address copy protection as a policy matter within its Navigation Device oversight jurisdiction, HRRC has collected

³² The entire statement of HRRC Core Principles is attached as Appendix B.

petition signatures directed to the Commission.³³ The main points of this petition were:³⁴

- *Consumers should be able to continue customary and reasonable home recording practices of programs received over digital cable and satellite systems.*
- *Free DTV broadcasts should not be encrypted.*
- *Licenses for the manufacture of "cable ready" products should allow connection to cable systems of video home recorders and PCs as "OpenCable" devices.*
- *Encryption of DTV or HDTV programming, by cable or satellite providers, for purposes of security or copy protection, should not result in preventing high resolution viewing of the program on a DTV receiver (no matter when purchased) by any consumer who has paid for the right to do so.*
- *By July 1, 2000, the Cable industry should be forced to meet all of its obligations to support competition, through the development and reasonable licensing of technical standards, in the market for Consumer Electronics and IT "OpenCable" devices. (Not simply the distribution of "POD" modules.)*

Each one of these points, except for encryption of free terrestrial broadcasts, is raised explicitly or implicitly in the NPRM. Taken together, they comprise the "value equation" for consumers as digital technology replaces analog features and functions. With respect to consumer viewing and home recording, they represent a value transition as to consumer practices since the Betamax was introduced in 1975 – and helped launch the present era of video entertainment prosperity. With respect to competition and choice of Navigation Devices, they represent an exciting new opportunity for consumers to enjoy the benefits of competition and innovation that have been available in open-market CE, IT and CPE products – but only if the OpenCable specifications are *fully* supported by the cable industry.

³³ As early as January, 1999, HRRC expressed public concern that an attempt might be made by entertainment industry interests to turn license or standards proceedings within FCC jurisdiction into agencies for the curtailment of consumer viewing based on copy protection considerations, and for an unbalanced resolution of copyright-related issues themselves.

³⁴ Sample pages from the petition are attached as Appendix C.

In the context of multi-industry licenses for bilateral use of encryption-based copy control technology, the expression and definition of "reasonable and customary" consumer practices should come through a formulation of "recording rules." In exchange for receiving the cooperation of the consumer device manufacturers in adhering to (in many cases, devising) the copy control technology, content providers empowered to invoke this technology should be bound by a reasonable compact as to when it can, and cannot, be used to prevent or limit consumer home recording. As testimony before the House Commerce Committee on October 28, 1999 revealed, at one point there was a clear consensus among HRRC and industry participants as to how such rules should be formulated and expressed in recommended legislation. But when the legislation did not attract consensus support, the "recording rules" became issues for negotiation in licensing contexts in which HRRC has not participated.

The essence of the draft "recording rule" outcomes that HRRC and the Consumer Electronics Association ("CEA") had negotiated with the Motion Picture Association of America was that consumers could be prohibited from making home recordings only (1) when the program is received as part of a unique and specific commercial transaction, such as purchase or rental of packaged media, or of a specifically requested pay-per-view or video-on-demand transmission, or (2) the source for the recording is itself a home recording. These outcomes were, in fact, adopted by the Congress, with respect to analog transmissions, in Section 1201(k) of the Digital Millennium Copyright Act.³⁵ HRRC believes that adopting the same general rule for digital transmissions would epitomize a fair and balanced transition, as to practices, as digital home networks emerge. The MPAA has also endorsed such an outcome for the digital world, providing that it were contained in new legislation that assured design compliance in devices.³⁶

³⁵ 17 U.S.C. § 1201(k).

³⁶ WIPO Hearing at 58.

The HRRC has a similarly long history of participating in FCC proceedings where the issue is competition. Without competition by makers and sellers, and choice by customers, consumer rights go unrealized. In this respect, HRRC emphasized in its petition to the Commission that FCC regulations clearly require that, by July 1, 2000, cable MSOs support the operation of competitive IT and CE devices on their systems in *all* respects necessary to their full functional equivalence to devices that are rented by the local system operators. Having procured a caseload, truckload, or even a warehouse full of POD devices by that date will do the consumer no good whatsoever if CableLabs has not provided timely specifications and lawful licenses to enable the manufacture and distribution of competitive host devices; or if MSO systems do not offer *all* of their features and functions to consumers who choose to rely on such devices. As the July 1 date approaches, HRRC intends to devote energy and vigilance to monitoring indications that compliance may not be adequate.

C. In this Proceeding, Core Principles Should Be Applied to Produce Pro-Consumer Results.

The Commission has asked for comment as to the extent to which its jurisdiction would allow it to grapple with public policy issues arising under the copyright law. These issues have been posed in the context of license proposals (over which the FCC has clear oversight jurisdiction) that would violate Commission regulations. Therefore, in HRRC's view, the FCC's choices are limited to refusing to relax its regulations – and therefore not allowing *any* impositions related to copy control to remain in the DFAST license – or, if the FCC does choose to relax these regulations, giving consideration to balanced public policy outcomes. HRRC believes in reasonable and balanced copyright policy outcomes that are fair to all, including program providers. So HRRC would encourage the Commission to take the latter course, and become engaged in assuring a fair outcome.

1. Inter-industry license negotiations should reflect a broad public interest.

A problem with leaving interface and recording rule outcomes entirely in the hands of the parties to license negotiations is that the seats on one side of the licensing table may reflect the industry and the technical talent of those who participate in standards proceedings, rather than a public policy agenda. Even those participants who, like the "5C" companies, responded to an open Call for Proposals of the Copy Protection Technical Working Group *and* have the interest and the resources to address public policy issues, may not feel comfortable purporting to represent all affected technology industries, or the consuming public, as to how the copy control balance should be struck. As Chairman Tauzin observed at the WIPO hearing, if outcomes emerge entirely from private negotiations, with no public input, public officials are going to hear from their constituents:

Why would you let this happen? Why did you let our expectations not be realized in this new world? So from the standpoint of those of us who return home every 2 years and get approval for our jobs, we are going to have to answer why did we allow their expectations to be dashed, if they are going to be dashed, in the exercise of compromises made in the rules of the road now.³⁷

Yet in supplying a technology that may become the lynch pin to broadly based technical standards, the technologists may find arrayed against them representatives of content and program distribution industries for whom such technology license negotiations may represent opportunities to regain ground, from consumers, on issues pertaining to available interfaces and copy control. Whether the parties like it or not, negotiations as to copy control technology become public policy disputes. In evaluating the course of such negotiations in the exercise of its oversight responsibilities, the Commission should bear in mind that this cannot be a pure marketplace negotiation, and the consuming public has no other way of expressing a direct, or even directly commercial, interest.

³⁷ *WIPO Hearing* at 53. See also testimony of Michael A. Moradzadeh at 54-55, 68.

2. "Recording rules" should reflect customary consumer practices and reasonable consumer expectations.

In this novel circumstance, the record available for the Commission's examination is, essentially, the record that consumers themselves have compiled over the past twenty-five years in which home video recording technology has been available to them. One need not be a wild-eyed radical to conclude that consumer behavior and Hollywood prosperity have gone hand in hand. Even Jack Valenti, President of the MPAA, recognized in his Telecommunications Subcommittee appearance that the public policy goal ought to be to carry forward present consumer conduct. He told the Subcommittee:

As of this moment, time shifting continues. Everything the consumer is doing now, the consumer can continue to do. Time shifting was what all the brouhaha was about for many years. That will continue, no question about that. *** I also know that the consumer needs to be able to do what he's doing now.³⁸

3. Consumers' rights to view programs for which they have paid should not be imperiled by a copy control agenda.

Even though the legitimacy of present day consumer private, noncommercial home recording has been well – and HRRC believes sincerely – accepted, the transition to digital techniques has presented both challenges and opportunities that the content production and distribution industries have not overlooked. On the challenge side, the content industry has always foreseen the *next* home recording product as the one that will break the home recording mold.

As we have noted, the motion picture industry now would like to ensure against the potential emergence of video recording products with broadband, component analog inputs, by assuring itself of the power to ban this interface from use as a high resolution output for viewing some or all programs. This approach, however, collides with the fact that the number of consumers already relying on

³⁸ *WIPO Hearing* at 53-54 (testimony of Jack Valenti, CEO, MPAA).

this interface for obtaining content for DTV display is approaching 200,000 and growing fast.³⁹ If consumer investment and practices are to be respected, and screens are not to go dark or fuzzy, the only long-term choice is to make this interface work in a way that is fair to both consumers and content interests, rather than to take advantage of a licensing event, originally meant to promote competition, to cut it off.

4. The FCC should approve only a DFAST license that preserves consumer choice.

Given the evident choice between changing FCC regulations so as to accept a result stacked against consumers, or insisting that it will approve only a balanced outcome, the Commission should choose the direction that the Congress identified in passing Section 304: consumer sovereignty and choice.

a. Consumer choice of products and configurations is the touchstone of the law and the FCC proceeding with respect to Navigation Devices.

In enacting Section 304, Congress identified the cable industry as one in which the potential benefits of competition had been held up by reliance on an outmoded product distribution paradigm, in order to minimize security exposure. Because of its *vulnerability* to theft of service, the cable industry had for decades been allowed to maintain a monopoly on the design, manufacture, distribution, and feature sets of consumer set-top boxes. It remained immune from competition as to technology, feature integration, or available interfaces. In passing Section 304, Congress recognized that digital technology represented a key to opening the padlock on design and competition, and releasing consumers from the stultification that had afflicted this market.

³⁹ It also seems unlikely that the marketplace would move away from reliance on this interface any time soon, even if copy-protected 1394 were available to all manufacturers, and licenses signed with all motion picture studios, tomorrow. Several manufacturers have indicated that they believe that the allocation of signal processing and conversion resources represented by this interface is the most efficient choice and ought to be available to consumers.

It would be ironic indeed if the Commission now were to permit and acquiesce in the same entrenched industry's use of the Commission's machinery, intended to bring consumers benefits under Section 304, again to place handcuffs on competition and consumer choice, as a consequence of one-sided license "compliance rules." In maintaining the integrity of its own regulations, and in exercising its declared oversight responsibilities, the Commission has an obligation to prevent this from happening.

b. The FCC should exercise its authority to insist on a balanced, pro-consumer outcome.

To put the case simply, the Commission should not allow or approve any outcome that would empower movie studios to cause DTV sets in the hands of consumers to go dark or fuzzy. Nor should it allow "compliance rules" to be imposed on devices that would ignore the balanced "recording rule" outcomes in whose service these digital copy control technologies were first developed. If there are to be obligations imposed on consumer devices in favor of the content and distribution industries, there must be balancing obligations imposed on these industries to ensure that consumers receive the benefit of their bargain in buying into the digital revolution.

c. In the interest of compliance with both Commission timetables and Commission regulations, a non-restrictive interim license should be offered pending negotiations toward a balanced result.

Looking at the calendar, it would seem that the "J2K" crisis as to compliance with the obligations placed on Cable MSOs (by July 1, 2000) cannot be eased, at least with respect to licensing, by anything other than an immediate, interim license that allows device manufacturers to begin work on production models. Such a license should be devoid of "compliance" obligations, including interface restrictions, in aid of copy protection objectives. Once the Commission has made a determination in this proceeding, it should then provide guidelines for negotiation of a lawful, permanent license for production and distribution.

Given the disadvantages under which CE and IT manufacturers already labor in breaking into this monopoly market, and small numbers likely in any initial product distribution, the risk to the content and distribution industries of such an approach would seem small. Without it, the manufacturers who would rely on FCC regulations for their opportunity to compete would be held back from doing so by a license proposal that is in clear disregard of those regulations.

- d. To the extent a long-term solution is considered beyond FCC jurisdiction, HRRC is willing to work with all parties to achieve a fair and balanced result through legislation.**

HRRC noted at the outset that some of the contentious copy protection issues arise from the fact that, thus far, digital technology may not offer enough gradations as to enforceable outcomes to afford a fine balancing of the interests of consumers and content providers. HRRC insists, confidently, that the record of the last twenty-five years shows that in such cases consumers have earned the benefit of the doubt.

HRRC has also said, however, that in some cases the only balanced application of fair "recording rules" may be to find an enforceable means of protecting the interfaces that content industries would prefer to be able to shut down. HRRC recognizes that it may not be within the interest, power or control of the industries over whom the FCC has licensing oversight to achieve such a result applicable to *all* conceivable future recording devices.⁴⁰ Ultimately it may be up to the Congress to achieve balanced application of technologies that are not "self-enforcing" with respect to future recorders.

The HRRC has a record of constructive participation in all congressional deliberations as to the appropriateness of such activity. In addition to the exercise

⁴⁰ While the intellectual property applicable to copy control techniques ultimately may reach all or a great number of future recording devices, so as to provide a legal lever to insist on compliance with bilateral technologies, there cannot be any assurance that this intellectual property will be encountered in all future recording devices that the marketplace may support. The DMCA is much too broad and blunt a tool for attempting to constrain device design in such fashion and would, and should, fail to do so.

of its own jurisdiction, the Commission may wish to consider making recommendations to the Congress as to alternatives for longer-term solutions. HRRC would cooperate and be pleased to participate in any such discussion.

IV. Conclusion

Mandated by Congress to empower rather than defeat consumer choice, the Commission should not allow either Hollywood or the Cable industry to maintain the power to disable consumer DTV devices or to impose a one-sided copy protection regime. The Commission should maintain the integrity of its regulations, and approve the imposition only of those specifications and licenses that are balanced, fair to consumers, and pro-competitive.

Respectfully submitted,

HOME RECORDING RIGHTS COALITION

A handwritten signature in black ink, appearing to read "Ruth Rodgers", is written over a horizontal line.

Ruth Rodgers
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May 24, 2000

Appendix A

The Home Recording Rights Coalition

The Home Recording Rights Coalition is a leading advocate for the right of consumers to use consumer electronics equipment and computers for private, noncommercial purposes. HRRC membership includes consumers, retailers, designers, installers, servicers, and manufacturers of audio and video recording products. Since its founding in 1981, HRRC has been America's premiere advocate for every consumer's right to buy and use home electronics and computing products free of unreasonable government restrictions.

The Home Recording Rights Coalition includes companies that are involved in the manufacture, sale and distribution of audio and video recorders and related equipment, including Hitachi Home Electronics (America) Inc, Matsushita Electric Corporation of America, Philips Electronics North America Corporation, Sony Electronics, Inc., Thomson Consumer Electronics USA, and Toshiba America Consumer Products, Inc.

The Coalition also includes many prominent trade associations and consumer groups, including the Arizona State Electronics Association; the Car Audio Specialists Association; the Consumer Alliance; the Consumer Electronics Association; the Consumer Recording Rights Committee; the Custom Electronic Design and Installation Association; the Electronic Industries Alliance; the Electronic Service Association of Connecticut; the Electronic Service Dealers of Illinois; the Electronics Technicians Guild of Rhode Island; the Electronics Technicians Guild of Massachusetts; the Greater New York Electronics Service Dealers Association the International Mass Retail Association; the International Society of Certified Electronics Technicians; the National Association of Retail Dealers of America; the National Association of Service Dealers; the National Electronics Service Dealers Association; NESDA of Ohio; the Professional Servicers Organization of California; the Oregon Consumer League; and the Professional Audio Retailers Association; Texas Electronics Association; and the Wisconsin Electronics Sales & Service Association.

Appendix B

HRRC CORE PRINCIPLES

- 1. *Fair Use remains vital to consumer welfare in the digital age. Consumers should continue to be able to engage in time-shifting, place-shifting, and other private, noncommercial rendering of lawfully obtained music and video content.***
 - ◆ Application of any technical measures should recognize fair use principles through “recording” rule limitations.
 - ◆ Consumer fair use rendering of content may include consumer-to-consumer exchanges.
- 2. *Products and services with substantial non-infringing uses, including those that enable fair use activities by consumers, should continue to be legal.***
 - ◆ The Supreme Court’s holding in the “Betamax” case has been essential for new and beneficial technology, products, and services to reach consumers.
- 3. *Home recording practices have nothing to do with commercial retransmission of signals, unauthorized commercial reproduction of content, or other acts of “piracy.” Home recording and piracy should not be confused.***
 - ◆ Such unlawful commercial activity occurs whether or not consumers have access to home recording technology, so ordinary consumers need not and should not be the target of efforts to deter it.
- 4. *Any technical constraints imposed on products or consumers by law, license or regulation should be narrowly tailored and construed, should not hinder technological innovation, and may be justified only to the extent that they foster the availability of content to consumers.***
 - ◆ Application of a technical measure that would entirely prevent a consumer from making audio home recordings on devices or media covered by the Audio Home Recording Act should be considered illegal under the Act.
 - ◆ The Digital Millennium Copyright Act should not be construed so as to mandate design conformance of a consumer electronics product or a computing product with any particular technical measure (other than the narrow, limited exception specified in section 1201(k) of the Act).
 - ◆ The Federal Communications Commission should not permit cable entities or others to deny lawful viewing of DTV signals to consumers based on copy protection concerns over product interfaces.

Appendix C

To: Hon. William E. Kennard
Chairman, Federal Communications Commission

As retailers, manufacturers, servicers, and personal users of Consumer Electronics and Information Technology products, we believe that everyone has benefited from new consumer products and technologies. We ask the Commission to guard against attempts by program providers, through license, contract, or otherwise, to ban new technology or limit consumer choice:

- Consumers should be able to continue reasonable and customary home recording practices of programs received over digital cable and satellite systems.
- Licenses for the manufacture of "cable ready" products should allow connection of video home recorders and PCs as "OpenCable" devices.
- Free DTV broadcasts should not be encrypted.
- Encryption of DTV or HDTV programming, by cable or satellite providers, for purposes of security or copy protection, should not result in preventing high resolution viewing of the program on a DTV receiver (no matter when purchased) by any consumer who has paid for the right to do so.
- By July 1, 2000, the Cable industry should be forced to meet all of its obligations to support competition, through the development and reasonable licensing of technical standards, in the market for Consumer Electronics and IT "OpenCable" devices. (Not simply the distribution of "POD" modules.)

We ask that the Commission be mindful of these concerns in its regulation and oversight of the broadcast, cable and satellite industries generally, and in the "OpenCable" and "Must Carry" proceedings, in particular.

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Certificate of Service

I, Ruth Rodgers, hereby certify that true copies of the foregoing Comments of the Home Recording Rights Coalition were served by hand on May 24, 2000, to the persons listed below.

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